(12)

SEP 27 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1944.

No. 460

HOWARD L. KERFOOT, as Administrator of the Goods, Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

Petitioner,

AGAINST

ROBERT H. KELLEY,

Defendant,

AND

RUTH KELLEY,

Respondent.

Petition and Brief in Support for Writ of Certiorari.

JACOB RASSNER,
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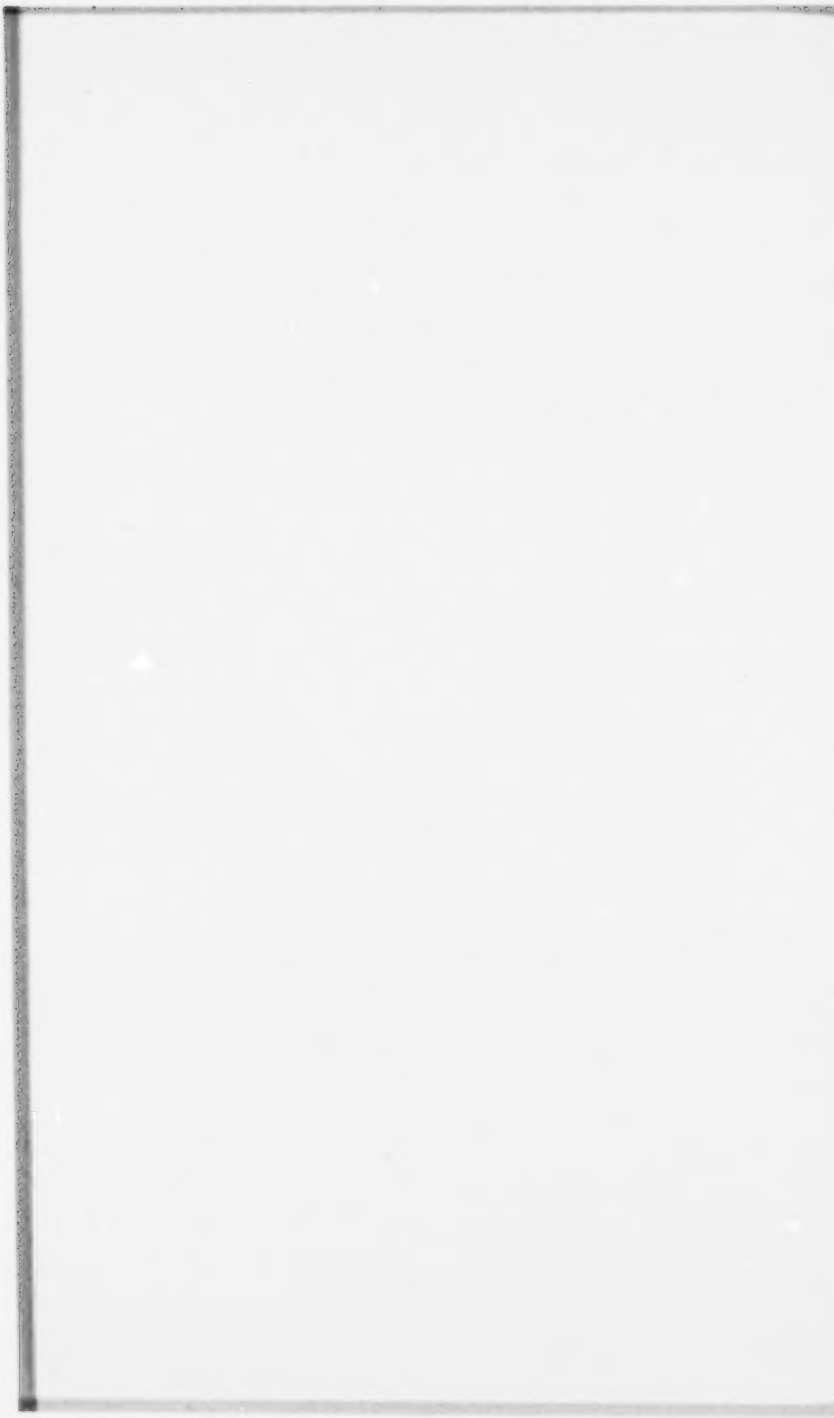

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

HOWARD L. KERFOOT, as Administrator of the Goods Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

Petitioner,

AGAINST

ROBERT H. KELLEY,

Defendant,

AND

RUTH KELLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the Court of Appeals of the State of New York in the above case.

Summary Statement of the Matter Involved.

This petition seeks to review a judgment of the Court of Appeals of the State of New York reversing the judgment of the Appellate Division of the Supreme Court in the First Judicial Department, which affirmed by a four to one decision a judgment of the Supreme Court in fa-

vor of the petitioner entered in Bronx County upon a verdict rendered by a jury in Trial Term (Hammer, *J.*), which verdict was predicated upon a factual issue in a negligence action.

The action was based on gross negligence.

The answer was a general denial, the Virginia Statute of Limitation, limitation of liability and contributory negligence.

The Facts.

Madeline Meredith Kerfoot, 32 years of age (fol. 107), petitioner's intestate, suffered injuries on the 6th day of May, 1939 (fol. 127) which resulted in her death on the 9th day of May, 1939 (fol. 120), leaving her surviving her husband, Howard L. Kerfoot, 34 years of age (fol. 107) and two infant children, Melvin Randolph, who was 10 years of age and Kathleen Anita, who was 8 years of age at the time of decedent's death (fols. 107-108).

The accident occurred at approximately 6:00 P. M., at Fishburne Park, Roanoke, Virginia, while the decedent was riding as a guest in an automobile driven by the respondent, Ruth Kelley (fols. 117-118, 187).

The accident was described by an eye witness, Elton Rardin, who at the time of the accident was a surveyor for the Norfolk and Western Railroad (R., p. 10), by deposition, as his personal attendance at the trial could not be arranged because Mr. Rardin was with the Armed Forces of the United States Government at the time of the trial.

The Questions of Law.

1. The jury in Trial Term before Judge Ernest E. L. Hammer, decided the case in favor of the petitioner and the said Trial Court denied the motion on behalf of respondent to set the verdict aside (R., p. 39).

The Appellate Division affirmed the judgment by a four to one decision, Martin, Dore, Cohn and Callahan, *J.J.* voting for affirmance and Untermyer, *J.*, dissenting without opinion.

The Court of Appeals of the State of New York unanimously reversed and dismissed the complaint which in effect was substituting a trial by the court in place of a trial by jury, in direct conflict with the laws of the State of Virginia and in violation of the seventh amendment to the Constitution of the United States of America.

Reasons for Allowance of the Writ.

The Court of Appeals of the State of New York has decided a question of law of widespread importance to every citizen of the United States denying to a litigant the right to a jury trial, in direct violation of the seventh amendment to the constitution of the United States of America.

The Court of Appeals of the State of New York has taken on to itself the prerogative of substituting its judgment in place of that of a jury on a question of fact which is probably untenable and in conflict with all authority not only of this Court but of every Court of the United States of America.

The decision of the lower court is an encroachment on the rights of a litigant to a trial by jury and in conflict with the decision of this Court in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

Dated, September 21, 1945.

HOWARD L. KERFOOT,

By: JACOB RASSNER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

HOWARD L. KERFOOT, as Administrator of the Goods Chattels and Credits of MADELINE MEREDITH KERFOOT, deceased,

Petitioner,

AGAINST

ROBERT H. KELLEY,

Defendant,

AND

RUTH KELLEY,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinion of the Court Below.

The opinion of the Court of Appeals of the State of New York is to be found reported in 294 N. Y. 288.

II.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

Congress of February 13, 1925 (U. S. C., Title 28, Section 347). The judgment to be reviewed was filed on May 25, 1945.

III.

Statement of the Case.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1-3 thereof.

IV.

Assignment of Errors.

The Court of Appeals violated the provisions of the seventh amendment to the Constitution of the United States of America.

The Court of Appeals of the State of New York erred in reversing the judgment of the Appellate Division of the Supreme Court in the First Juudicial Department, which affirmed by a four to one decision a judgment of the Supreme Court in favor of the petitioner entered in Bronx County upon a verdict rendered by a jury in Trial Term (Hammer, *J.*), which verdict was predicated upon a factual issue in a negligence action.

The error of the Court of Appeals of the State of New York was that it took to itself, and took from the jury, the prerogative of deciding a question of fact on conflicting testimony.

The Court of Appeals of the State of New York committed further error in taking from the jury and taking on to itself the right of passing upon the probative value, credibility and sufficiency of the evidence.

Summary of Argument.

This Court has never permitted an encroachment upon the rights of a litigant to a trial by jury. The preroga-

tive of passing upon an issue of fact has been summarily and unjustly taken away from the jury and assumed by the Court of Appeals of the State of New York contrary to all law and in violation and direct contradiction of the law as laid down by this Court in the case of *Slocum* v. *N. Y. Life Insurance Co.*, 228 U. S. 364 and in violation of the seventh amendment to the Constitution of the United States of America.

POINT I.

The Court erred in substituting its judgment on the facts for that of the jury.

As early as 1830, in the case of:

Parsons v. *Bedford*, 3 Pet. 433, 1830, 28 U. S. 433,

the Court laid down a principle of law which has consistently been followed by all the Courts of this country ever since, and which principle was reiterated in the case of:

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364,

wherein the court stated on page 378 as follows:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of:

> *Walker* v. *New Mexico &c. Railroad Co.*, 165 U. S. 593:

"This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In the case of:

Johnson v. *Dierks Lumber & Coal Co.*, 130 Fed. (2d) 115,

the court stated on page 119:

"Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

See also:

Goldstein v. *Pullman*, 220 N. Y. 549;
Tantillo v. *Goldstein Bros. Amusement Co.*, 248 N. Y. 286;
McNally v. *Oakwood*, 210 App. Div. 612, aff'd 240 N. Y. 600.

In the case of *Howard* v. *Louisiana & A. Ry. Co.*, 49 Fed. (2d) 571, the court stated on page 574:

"This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R.R. Co.* v. *Groeger*, 266 U. S. 521, the court stated on page 524:

"The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

In the case at bar the trial court as well as four judges of the Appellate Division of the Supreme Court of the State of New York agreed with the jury that the evidence showed gross negligence.

POINT II.

There was ample evidence to sustain the jury's findings.

The action was tried under the well settled laws of the State of Virginia, that where a vehicle is driven in such a manner as to knowingly or wantonly increase the ordinary risks of driving resulting in injury to a guest, it constitutes gross negligence and imposes liability on the driver for the injuries or death suffered by the guest. See:

Poole v. *Kelley*, 162 Va. 279,

where on pages 289 and 290 the court stated:

> "We do not undertake to say that any certain speed is gross negligence where the road is wide and straight. What may be deemed ordinary care in one case may under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reason-

able men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

Under the Virginia law, approval of a verdict by the trial judge adds weight to the verdict. See:

Margiotta v. *Aycock*, 162 Va. 557.

In the case at bar the trial judge approved the jury verdict.

Mrs. Kelley drove her car around a sharp bend (R., p. 12) on a narrow road (R., p. 11) at an excessive rate of speed (R., p. 13), then drove her car along the wrong side of the roadway (R., p. 13) at the rate of 50 miles an hour (R., p. 13); she rode with her two left wheels in a ditch 18" deep (R., p. 11) for a distance of 30 feet (R., p. 13) at the same rate of speed; she then turned her car sharply to the right out of the ditch without slackening speed; then drove diagonally across the road still going at 50 miles an hour (R., p. 13) at which place the car overturned and went down an embankment on the right side of the road, turning over about three times and landing 15 feet away from the road (R., p. 14). The car was seen by the eye witness from the time it started to make the curve 200 feet away (R., p. 12) until it was 75 feet past the witness (R., p. 16).

The defendant did not take the witness stand nor was any explanation offered for her not being present at the trial, hence the jury was justified in accepting as true all the inferences which could be reasonably drawn from the plaintiff's testimony.

No reasonable person can honestly state that driving a car at the rate of 50 miles an hour along the wrong side of the roadway will not add to the ordinary risks of driving. That in itself is sufficient to sustain the jury's findings of gross negligence.

Driving with two wheels in a ditch 18" deep at the rate of 50 miles an hour is hardly the type of driving that a guest can be expected to anticipate or constitutes such risk as she can reasonably be expected to foresee or assume.

Driving from the right side of the road clear across to the left and back again to the right, is likewise not a reasonable risk that a guest should be expected to assume.

Coupled with the foregoing, there was the deliberate disregard and wanton carelessness of driving around a sharp curve on a narrow road at the rate of 50 miles an hour.

All of the foregoing facts were testified to by an eye witness, a reputable person, formerly a surveyor for the Norfolk and Western Railroad (127) and a member of the United States Armed Forces at the time of the deposition (126).

All reasonable inferences could be drawn therefrom, particularly where there was no contradiction by any witness nor by the defendant herself.

In the *Poole* case, *supra*, on page 289, the court stated:

> "He then lost control and it is reasonable to assume that he lost control because he attempted to turn too sharply traveling at excessive speed." * * *

In the case at bar there was more evidence of fault, as well as evidence of fault of a greater degree, than in the *Poole* case, *supra*, in which the court stated on page 284:

> "We have a verdict, confirmed by the judge who saw the witnesses and heard the evidence. It must be sustained if there is substantial evidence to support it. All presumptions are in its favor."

In the case at bar the trial judge and four appellate court judges confirmed the jury's verdict.

In the case of *Judy* v. *Doyle*, 130 Va. 392, the court stated on pages 405 and 406:

> "It is the province of the court to determine in the first instance whether or not the facts offered in evidence, tending to prove an injury to a plaintiff, are too remote from the defendant's act of negligence, to constitute an element of the plaintiff's recovery."

The Trial Court did so in the case at bar in favor of the petitioner.

The evidence was amply sufficient to sustain the verdict and the Trial Court so found.

The Trial Court found that there was sufficient facts offered in evidence tending to prove that the respondent was guilty of gross negligence and in which finding said Trial Court was sustained by the Appellate Division of the Supreme Court of the State of New York.

It seems that the uniform view of the highest courts of the State of Virginia is to impose liability on a driver who meets with an accident on crossing to the wrong side of the road or who attempts to negotiate a sharp turn at a fast rate of speed.

The decisions relied on by the lower Court state nothing to the contrary but actually sustain this view.

The uncontradicted evidence in the case at bar shows:

a. Respondent drove on the wrong side of the road.

b. Respondent drove with her two left wheels in a ditch 18" deep and on the wrong side of the road.

c. Respondent drove for a distance of 30 feet with the two left wheels in said ditch without slackening speed.

d. Respondent drove up out of the said ditch across to the other side of the road and down an embankment without slackening speed.

e. Respondent negotiated a sharp curve on a narrow road at the rate of 50 miles an hour.

f. Respondent drove on the wrong side of the road into a ditch across the road and down an embankment, a distance of over 225 feet at the rate of 50 miles an hour without slackening speed.

The lower Court stated:

> "No evidence was adduced to explain what caused the car to leave the highway. The defendant, Ruth Kelley, who was driving the car was not called as a witness."

The lower Court in effect has stated that the twelve jurors, that the Trial Court and the four Judges of the Appellate Division of the Supreme Court of the State of New York did not act as average reasonable men when they found that driving around a sharp curve on a narrow road at the rate of 50 miles an hour into a ditch on the wrong side of the road and then across to the other side of the road and down an embankment without any effort to slacken speed for a distance of over 225 feet, were not sufficient facts to warrant the conclusion that Ruth Kelley did not add to the usual perils of the road.

None of the Virginia courts are in accord with the decision of the lower Court. Are the decisions relied on by the lower Court an exception to the generally accepted view of the Virginia courts as laid down in the *Poole* case, *supra.*

The Virginia courts have held that driving on the wrong side of the road may be considered as evidence of

gross negligence as may be the fact that the vehicle was being driven around a sharp turn at a fast rate of speed.

See:

Collins v. *Robinson*, 160 Va. 520;
Margiotta v. *Aycock*, 162 Va. 557;
Stubbs v. *Parker*, 169 Va. 676;
Hackley v. *Robey*, 170 Va. 55;
Watson v. *Coles*, 170 Va. 141;
Thornhill v. *Thornhill*, 172 Va. 553;
Yorke v. *Cottle*, 173 Va. 372;
Worcester v. *McClurkin*, 174 Va. 221.

All of the foregoing cases were cited with approval in the case of *Carroll* v. *Miller*, 175 Va. 388, which decision was called by the lower Court as being "an authoritative and complete review of these decisions * * *."

POINT III.

The decisions relied on by the lower Court do not rule this case.

The lower Court relies upon four decisions, none of which rule this case.

In the case of *Massaletti* v. *Fitzroy*, 228 Mass. 487, there was *no claim made* of gross negligence and *no evidence offered* of gross negligence. The decision by the court was that the claim of gross negligence should have been made and some proof offered to sustain it in order for the plaintiff to recover.

In the case of *Young* v. *Dyer*, 161 Va. 434, the trial court set aside the verdict as there was no evidence of any negligence whatsoever, merely proof of driving an automobile at 50 miles an hour over an unfamiliar road. There was no proof of a narrow road, of a sharp turn, of driving on the wrong side of the road, of driving in a ditch, of failing to slacken speed after the vehicle had

left the road, in fact no facts comparable to the facts in the case at bar.

It might be in place to point out that the Virginia courts give a great deal of weight to the determination of the trial court as to whether or not there was sufficient facts offered in evidence to sustain the verdict.

In the *Young* case, *supra,* the trial court found that there were not, in the case at bar, the trial court found that there were.

In the case of *Boggs* v. *Plybon,* 157 Va. 30 and in the case of *Carroll* v. *Miller,* 175 Va. 388, there was no such evidence as was offered in the case at bar. The evidence in each case was that the automobile was not driven at an excess rate of speed but in each case at but 35 miles an hour. In both cases it was shown that it was no narrow road, no sharp curve and no crossing to the wrong side of the road.

It is respectfully submitted that a reading of the case of *Carroll* v. *Miller, supra,* called an "authoritative" case by the lower Court will show that a set of facts such as presented at the trial of the case at bar are amply sufficient to sustain the jury's verdict and *does not stand for the principle* which the Court of Appeals of the State of New York says it stands for in its opinion in the case at bar.

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.

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OCTOBER TERM, 1945

No. 460

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Petitioner,

—against—

ROBERT H. KELLEY,

Defendant,

—and—

RUTH KELLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1945

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Petitioner,

—against—

ROBERT H. KELLEY,

Defendant,

—and—

RUTH KELLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

ARGUMENT

I

The seventh amendment to the Constitution of the United States, respecting the right to trial by jury in suits at common law, relates only to trials in the courts of the United States and has no application to trials in State courts.

In *Walker* v. *Sauvinet*, 92 U. S. 90, this Court said:

> "By Art. 7 of the amendments, it is provided, 'that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the Courts of the United States. *Edwards* v. *Elliot*, 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 280."

And in *Middleton* v. *Whitridge*, (213 N. Y. 499, at 506, 507), the New York Court of Appeals said:

> "The Seventh Amendment to the Federal Constitution does not limit State action, and so *Slocum* v. *New York Life Ins. Co.* (228 U. S. 364) is not controlling. The provision of the State Constitution guarantees the substantial right of trial by jury, but it contains no language even suggestive of a purpose to preserve ancient common-law forms and rules of procedure."

It is significant that the New York Court of Appeals did not certify, in its remittitur, (R., pp. 44, 45) that any question was involved either under the Federal or State constitutions.

This Court does not undertake to determine whether the procedure in a State court was in accordance with the State law. The final judgment of the State court determines that it was.

United Gas Co. v. *Texas*, 303 U. S. 123.

II

The determination made by the New York State Court of Appeals was strictly within its power and jurisdiction.

Petitioner asserts (p. 3, petition) that by reversing the judgments of the lower courts and dismissing the complaint, the New York Court of Appeals "in effect" substituted a trial by the court in place of a trial by jury, and that the New York Court of Appeals took

to itself "the right of passing upon the probative value, credibility and sufficiency of the evidence," (p. 5, petitioner's brief).

Cases are cited (p. 7, petitioner's brief) to the effect that the credibility of witnesses and the weight and probative value of evidence are to be determined by the jury.

The petitioner not only confuses, but wholly disregards, the distinction between the weight and preponderance of the evidence on the one hand, and the legal sufficiency of the evidence on the other hand. The former presents a question of fact for the determination of the jury while the latter presents solely a question of law for determination by the court.

That "insufficient evidence is, in the eye of the law, no evidence" has been so often reiterated that extended citation of authority is unnecessary.

Matter of Case, 214 N. Y. 199.

In that case the court quoted from prior decisions:

> "When we say that there is no evidence to go to the jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

The "scintilla of evidence" rule has been rejected in New York. There must be more than a scintilla of evidence to carry an issue to the jury.

Powers v. *N. Y. Central & H. R. R. Co.*, 60 Hun 19, 14 N. Y. Suppl. 408, affd. no opinion 128 N. Y. 659;

Leinkauf v. *Lombard*, 137 N. Y. 417, at 425.

In the case at bar, defendant resided in the State of New York when the action was commenced. (New York Court of Appeals case on appeal, fols. 12, 110). Plaintiff brought suit in the Supreme Court of the State of New York under the provisions of the law of Virginia (R., p. 1) to recover damages for the alleged wrongful death of his wife as a result of an automobile accident in Virginia where the decedent then resided, (R., p. 2).

The decedent was a guest riding in the automobile at the time of the accident (R., p. 2).

The Virginia statute (R., p. 24) provides that:

> "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported, shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator."

Defendant's counsel moved to dismiss on the ground that plaintiff had failed to prove any negligence of the defendant "much less to prove gross negligence" and also on the ground that there was no proof that decedent was free from contributory negligence as alleged in the complaint. The motion was denied and exception taken (R. pp. 23, 24 and New York Court of Appeals record p. 78, omitted in printing, R., p. 46).

The case was permitted to go to the jury which brought in a verdict for the plaintiff (R., p. 39).

On appeal by defendant to the Appellate Division of the New York Supreme Court (the New York intermediate court of appeal) the judgment entered upon the verdict was affirmed, without opinion, but one of the Justices dissented and voted to reverse and to dismiss the complaint (R., p. 40).

This permitted further appeal to the New York Court of Appeals, where the judgments of the lower courts were reversed and the complaint was dismissed (R., pp. 43, 44).

That Court followed the Virginia decisions, defining gross negligence and wanton disregard of the safety of the deceased, (R., p. 42) and held that "the evidence in this case was clearly insufficient to prove gross negligence as defined in the controlling decisions of the highest court in the State of Virginia" (R., p. 43). The court said that "the complaint should have been dismissed," reversed the judgments of the lower courts and dismissed the complaint (R., p. 43).

This did not constitute a ruling on a question of fact, *i. e.*, the preponderance or weight of the evidence, as contended by petitioner. It was a ruling on a question of law, *i. e.*, the insufficiency of the evidence.

The New York State Constitution (Article 6, section 7) limits the jurisdiction of the New York Court of Appeals to the determination of questions of law in civil actions except in the one instance where, the Appellate Division of the Supreme Court (the intermediate court of appeal) makes new findings of its own, in which event the New York Court of Appeals may review such new findings.

The New York Court of Appeals has at all times exercised the right to reverse on questions of law in jury cases.

If as a matter of law a dismissal of the complaint or a direction of a verdict is proper, no constitutional right is invaded by the determination of the cause by the trial justice without taking a verdict of the jury. If in such case the trial justice erroneously submits the case to the jury when he should have dismissed the case because there was no question of fact for the determination of the jury, the Appellate Court is fully authorized to correct the error and to make final disposition of the case in the manner in which the trial justice should have disposed of the case in the first instance, *i. e.*, by dismissing it as a matter of law. Such disposition by the Appellate Court does not violate any constitutional right as no such right ever existed. The error which the Appellate Court thus corrects is the error of the Court and not any error of the jury. "The province of the jury is not invaded by the correction of such an error and the rendition of the judgment which ought to have been rendered by the trial court."

Middleton v. *Whitridge*, 213 N. Y. 499 at 507;

Herrman v. *U. S. Trust Co.*, 221 N. Y. 143;

Bullock v. *N. Y. Central and H. R. R. Co.*, 213 N. Y. 694.

In 1925, the authority of the New York Court of Appeals to render final judgment of dismissal was expressly affirmed by constitutional amendment which provided (Art. 6, sec. 8), that "upon an appeal from a judgment or an order, any Appellate Court to which the appeal is taken which is authorized to review such judgment or order, may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each

interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing."

Under this constitutional authority, the New York Court of Appeals, when reversing on the ground that the evidence is insufficient as a matter of law, is no longer required to send the case back to the lower court for further proceedings. It is not "necessary or proper to grant a new trial or hearing" because no issue of fact remains for trial.

The New York Court of Appeals has the same power to render final judgment as has the Appellate Division of the New York Supreme Court.

Matter of Winburn, 270 N. Y. 196.

The 1925 constitutional amendment merely conferred upon the New York Court of Appeals the authority to make the determination which the Trial Justice should have made.

CONCLUSION.

Petitioner has not shown any ground recognized by this court as the basis for a Writ of Certiorari and his petition should be denied.

October 16, 1945.

Respectfully submitted,

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